

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIYAM AKMAL,

Plaintiff,

V.

CITY OF KENT, et al.,

Defendants.

CASE NO. C13-0379JLR

ORDER GRANTING
DEFENDANT ALSTON'S
MOTION TO DISMISS

I. INTRODUCTION

Before the court is Defendant Michael Alston’s motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim (Mot. (Dkt. # 46)), and Plaintiff Mariyam Akmal’s request for entry of default (*see* Resp. (Dkt. # 48) at 2.) The court has examined the submissions of the parties, the balance of the record, and the governing

1 law. Considering itself fully advised, the court GRANTS Mr. Alston's motion to dismiss
 2 (Dkt. # 46) and DENIES Ms. Akmal's request for entry of default (Dkt. # 48).¹

3 **II. BACKGROUND**

4 Ms. Akmal filed the instant case on March 5, 2013, and has since amended her
 5 complaint twice. (*See* Compl. (Dkt. # 4); Am. Compl. (Dkt. # 27); 2d Am. Compl. (Dkt.
 6 # 43).) Ms. Akmal's three complaints are similar to one another, and in each of them she
 7 alleges a laundry list of civil rights violations against the City of Kent ("City"), the Kent
 8 Police Department ("Kent Police"), and other public figures, including Mr. Alston, who
 9 is the Director of the Office of Civil Rights ("OCR") within the Federal Department of
 10 Justice's Office of Justice Programs. (*Id.*) Ms. Akmal is suing Mr. Alston in his personal
 11 capacity. (*Id.*) The crux of Ms. Akmal's allegations are that Kent Police and other public
 12 officials in the City engaged in a "civil conspiracy" against her. (*See* 2d Am. Compl.
 13 ¶ 34.)

14 Ms. Akmal's conspiracy allegations include discrimination by Kent Police officers
 15 because of her religion, race, and gender. (*Id.* ¶¶ 17, 34.) Ms. Akmal is an African-
 16 American Muslim. (*Id.*) She claims that Kent Police discriminated against her because
 17 they "repeatedly, over a decade, refused to allow her to lodge crime reports that she has
 18 been harassed both electronically and in real life, as well as stalked by a networked group
 19 of mostly anonymous individuals." (*Id.* ¶ 17.) Ms. Akmal also alleges that Kent Police
 20 retaliated against her for her attempted complaints by getting her fired, stealing money

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 22 ¹ No party requested oral argument, and the court finds it unnecessary.

1 from her bank account, and painting her in a false light because she lawfully owns a
 2 firearm. (See *id.* ¶¶ 24-26.)

3 Ms. Akmal also alleges that she was discriminated against by the City. She claims
 4 that she was asked to, and did, give her contact information to the City Clerk in 2010 for
 5 investigatory purposes, that afterward her complaints were not investigated, and that the
 6 City used her personal information to stalk and retaliate against her. (*Id.*) This stalking
 7 and retaliation included “entering her home while in her absence, taking items from her
 8 home, going through her personal correspondence, computers, etc. and then using this
 9 gleaned knowledge to anonymously stalk, track, and taunt her.” (*Id.*) Ms. Akmal also
 10 alleges that she was threatened by agents of the City. (*Id.*) She states, “[t]o date, they
 11 continue to send her veiled threats of physical harm—‘I can hurt you,’ ‘you know what
 12 they say about the squeaky wheel,’ references to playing ‘Cowboys & Muslims’ but
 13 dipping the bullet in pig grease first” (*Id.*)

14 Ms. Akmal complained about the City’s and Kent Police’s conduct to OCR on
 15 March 15, 2007, and OCR closed her case on May 1, 2007. (*Id.* ¶ 28; Cooper Aff. (Dkt.
 16 # 51) ¶ 2.) Ms. Akmal claims that Mr. Alston told her “that she could complain all she
 17 wanted and [could] complain to his boss all day long but that *‘no one is ever going to*
 18 *help you.’*” (2d Am. Compl. ¶¶ 28-29 (emphasis in original).)

19 Mr. Alston now moves to dismiss Ms. Akmal’s claims against him for lack of
 20 subject matter jurisdiction and failure to state a claim under Federal Rules of Civil
 21 Procedure 12(b)(1) and 12(b)(6). (See Mot. at 3-5 (citing Fed. R. Civ. P. 12(b)(1), (6))).
 22 He argues that Ms. Akmal’s claims should be dismissed because Ms. Akmal “has failed

1 to plead any facts to show that [he] violated any [of her] constitutional rights,” “has failed
 2 to plead any facts to show that her claims against [him] are not barred by the statute of
 3 limitations,” and because “there is an alternative existing process for [her] to address her
 4 claims of alleged discrimination by recipients of federal funds.” (*Id.* at 1, 8.)

5 Against the motion for dismissal, Ms. Akmal argues that “Mr. Alston’s repeated
 6 refusal to conduct the investigation upon receipt of the required paperwork supplied by
 7 [her] amounts to a deprivation of her Constitutional rights under the First, Fifth, and
 8 Fourteenth Amendments.”² (Resp. at 2.) Ms. Akmal also asks the court to enter a default
 9 against Mr. Alston for failing to timely answer her complaint. (*Id.*)

10 III. ANALYSIS

11 A. Motion to Dismiss Standards

12 Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(1) when the
 13 court lacks subject matter jurisdiction over the claim. *See Fed. R. Civ. P.* 12(b)(1).
 14 Subject matter jurisdiction is a threshold issue that goes to the court’s power to hear the
 15 case. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998). A motion to
 16 dismiss for lack of subject matter jurisdiction can attack the allegations either facially or
 17 factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A
 18 moving party factually attacks the allegations by “disput[ing] the truth of the allegations
 19 that, by themselves, would otherwise invoke federal jurisdiction.” *Id.* A moving party

21 ² Ms. Akmal also mentions a Second Amendment violation in her complaint but she does
 22 not indicate in her complaint or her response that Mr. Alston, specifically, violated her Second
 Amendment rights. (*See Compl.* ¶¶ 16, 34; *see generally* Resp.)

1 facially attacks the allegations by asserting “that allegations contained in the complaint
 2 are insufficient on their face to invoke federal jurisdiction.” *Id.*

3 A federal court may also dismiss a plaintiff’s claims if he or she fails to state a
 4 claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering
 5 a motion to dismiss under either Federal Rule of Civil Procedure 12(b)(6) or 12(b)(1), the
 6 court construes the complaint in the light most favorable to the non-moving party. *See*
 7 *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005);
 8 *see also Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Generally, the court
 9 must accept as true all well-pleaded allegations of material fact and draw all reasonable
 10 inferences in favor of the plaintiff. *See Wyler Summit P’ship v. Turner Broad. Sys., Inc.*,
 11 135 F.3d 658, 661 (9th Cir. 1998). This is particularly true when a plaintiff appears pro
 12 se, because the court must construe pro se plaintiffs’ pleadings liberally and afford them
 13 the benefit of the doubt. *See, e.g., Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623
 14 (9th Cir. 1988). The court, however, need not accept as true a legal conclusion presented
 15 as a factual allegation. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009).

16 A complaint generally must contain “a short and plain statement of the claim
 17 showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Furthermore,
 18 “[t]o survive a [12(b)(6)] motion to dismiss, a complaint must contain sufficient factual
 19 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*,
 20 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see*
 21 *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial
 22 plausibility when the plaintiff pleads factual content that allows the court to draw the

1 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556
2 U.S. at 678. Dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal
3 theory or the absence of sufficient factual allegations under a cognizable legal theory.
4 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). If the court finds
5 that dismissal is warranted, the court must grant the pro se plaintiff leave to amend unless
6 it is absolutely clear that amendment could not cure the defects. *Lucas v. Dep’t of*
7 *Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

8 **B. Subject Matter Jurisdiction and Mr. Alston’s Argument About Alternative
9 Remedies**

10 As a threshold matter the court must address subject matter jurisdiction.
11 Generally, an individual may sue federal officers for constitutional violations in their
12 individual capacity based on the Supreme Court’s precedent in *Bivens v. Six Unknown
13 Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, Mr.
14 Alston argues that a *Bivens* claim is not available to Ms. Akmal and that her claim should
15 be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure
16 12(b)(1). Specifically, Mr. Alston argues that Ms. Akmal cannot bring her *Bivens* claim
17 because she has an alternative administrative remedy and the Supreme Court has held
18 that *Bivens* claims are not available when alternative remedies exist. (Mot. at 8-9.); see
19 *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009) (If there is
20 “any alternative, existing process for protecting the plaintiffs’ interests [s]uch an
21 alternative remedy would raise the inference that Congress expected the Judiciary to stay
22 its *Bivens* hand.”) (internal citations omitted). Mr. Alston contends that there is an

1 alternative process for Ms. Akmal to bring her claim because the statute governing the
2 Office of Justice Programs says that persons who claim they were discriminated against
3 by entities funded by that office, like OCR, must exhaust administrative remedies before
4 filing suit. (See Mot. at 9 (citing 42 U.S.C. § 3789d).) However, that statute only
5 discusses the need to exhaust administrative remedies when “a State government or unit
6 of local government, or any officer or employee thereof acting in an official capacity, has
7 engaged in [discrimination]” 42 U.S.C. § 3789d(c)(4)(A). Mr. Alston and OCR are
8 not a unit of state or local government (see Mot. at 2-3), nor is Mr. Alston being sued in
9 his official capacity (see generally Not. of Rem. Ex. A). Therefore, the alternative
10 remedy Mr. Alston describes does not apply to Ms. Akmal’s claims, and a *Bivens* claim is
11 still potentially available. Additionally, based on the court’s research and the parties’
12 pleadings, there appear to be no cases where other courts have held that *Bivens* actions
13 are unavailable with respect to claims against OCR officials sued in their personal
14 capacities. (See Mot. at 9; Resp. at 12-13.) Thus, the court does not lack subject matter
15 jurisdiction over Ms. Akmal’s claims, and it declines to grant Mr. Alston’s motion to
16 dismiss on this ground.

17 **C. Ms. Akmal Fails to State any Claims for Relief Against Mr. Alston**

18 Ms. Akmal’s complaint should nonetheless be dismissed with respect to Mr.
19 Alston because she does not allege facts showing that he violated her constitutional
20 rights. (See generally 2d Am. Compl.) To state a claim under *Bivens*, a plaintiff must
21 allege (1) that a right secured by the Constitution was violated and (2) that the alleged
22 violation was committed by a federal actor. See *Van Strum v. Lawn*, 940 F.2d 406, 409

1 (9th Cir. 1991). Here, the sole reference to Mr. Alston in Ms. Akmal's complaint is his
2 alleged statement, "no one is ever going to help you." (2d Am. Compl ¶ 29.) This
3 statement does not allege any facts showing that Mr. Alston violated Ms. Akmal's
4 constitutional rights or that he took any improper action against her. Even taking the
5 alleged statement as true, it does not show that Mr. Alston violated Ms. Akmal's First,
6 Fifth, or Fourteenth Amendment rights. *See* U.S. Const. Amends. I, V, XIV.

7 Furthermore, the pleading defects in Ms. Akmal's complaint are not cured by the
8 argument in her response memorandum that the statement "was the defendant's final
9 word to her at the culmination of close to two years' worth of effort in an attempt to have
10 [OCR] open an investigation into . . . the Kent [Police]." (Resp. at 7.) Ms. Akmal does
11 not provide any information about her attempts to have OCR investigate her claims, and
12 Mr. Alston has proffered evidence that OCR did open an investigation based on a
13 complaint by Ms. Akmal and that this investigation was closed in 2007. (Cooper Aff.
14 ¶ 2.) Regardless, even if this was Mr. Alston's "final word," Ms. Akmal does not explain
15 how the statement was discriminatory or violated any of her constitutional rights. The
16 court need not accept Ms. Akmal's legal conclusion that "discrimination of this nature
17 and by a high-ranking employee of the U.S. Department of Justice is a violation of her
18 [Constitutional] right[] to equal protection." *See Iqbal*, 556 U.S. at 664. Ms. Akmal has
19 failed to state a claim for relief against Mr. Alston, and thus, the court GRANTS Mr.
20 Alston's motion to dismiss and DISMISSES Ms. Akmal's claims without prejudice. The
21 court also GRANTS Ms. Akmal leave to amend her complaint within 10 days. *See*
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1 | *Lucas*, 66 F.3d at 248. (explaining that granting leave to amend to pro se plaintiffs is
2 mandatory unless it is clear that amendment could not cure the defects).

3 | **D. Mr. Alston's Statute of Limitations Argument**

4 | Alternatively, Mr. Alston argues that Ms. Akmal's *Bivens* claims should be
5 | dismissed under Federal Rule of Civil Procedure 12(b)(6) because they are barred by the
6 | applicable statute of limitations. (Mot. at 11-12.) The court rejects this argument but
7 | will address it nonetheless because it relates to the court's decision to grant Ms. Akmal
8 | leave to amend. Generally, a court does not need to grant leave to amend if the statute of
9 | limitations has run because amendment in these circumstances would not cure the
10 | defects. *See, e.g., Teaupa v. U.S. Nat. Bank N.A.*, 836 F. Supp. 2d 1083, 1095 (D. Haw.
11 | 2011).

12 | It is not apparent from the face of Ms. Akmal's complaint that the statute of
13 | limitations has run. A statute of limitations defense can form the basis of a Federal Rule
14 | of Civil Procedure 12(b)(6) motion to dismiss if the facts and dates alleged on the face of
15 | the complaint indicate that the claim is time-barred. *Von Saher v. Norton Simon
16 | Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010). Dismissal is only
17 | appropriate, however, if it appears beyond doubt that the plaintiff can prove no set of
18 | facts that would establish the timeliness of the claim. *Id.* Here, Ms. Akmal does not
19 | indicate in her complaint when Mr. Alston's alleged statement was made (*see* 2d Am.
20 | Compl. ¶ 24), and in her response she indicates that she has had multiple recent contacts
21 | with OCR (*see* Resp. at 11). Although Mr. Alston provides evidence showing that Ms.
22 | Akmal's claims arose in 2007, which would make them time-barred under the

1 appropriate statute of limitations,³ it is not evident on the face of the complaint that Ms.
2 Akmal's claims are time-barred. *See Von Saher*, 592 F.3d at 969. Thus, the court
3 declines to grant Mr. Alston's motion to dismiss on this ground. If Ms. Akmal amends
4 her complaint, she should take particular care to provide facts showing that her claims
5 are not time-barred.

6 E. Ms. Akmal has not Properly Moved for Default Against Mr. Alston

7 Last, with respect to Ms. Akmal’s request to enter default, the court finds that
8 entry of default against Mr. Alston is not appropriate at this time. As has already been
9 explained to Ms. Akmal in prior orders, motions for entry of default must be filed and
10 pled in accordance with the Federal and Local Rules. (See Ord. (Dkt. # 33).) Entry of
11 default is governed by Federal Rule of Civil Procedure 55(a), which requires the clerk to
12 enter default “[w]hen a party against whom a judgment for affirmative relief is sought has
13 failed to plead or otherwise defend.” Fed. R. Civ. P. 55(a). In order to obtain an entry of
14 default, a party must support its motion by affidavit “show[ing] that the defaulting party
15 was served in a manner authorized by Fed. R. Civ. P. 4.” Local Rules W.D. Wash. LCR
16 55(a). Additionally, if a defaulting party has already entered an appearance, the moving
17 party must provide the defaulting party written notice of its intent to move for entry of
18 default at least 14 days prior to filing its motion. *Id.*

1 Ms. Akmal has not complied with Local Rule 55(a). She has not filed an affidavit
2 showing that Mr. Alston was properly served pursuant to Federal Rule of Civil Procedure
3 4 (*see generally* Dkt.), nor has she provided 14 days written notice to Mr. Alston prior to
4 requesting default even though he has appeared in this action (*see* Not. of App.
5 (Dkt. # 45)). Accordingly, her request for entry of default is DENIED.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the court GRANTS Mr. Alston's motion to dismiss
8 (Dkt. # 46), but provides Ms. Akmal leave to amend her complaint within 10 days of the
9 date of this order. The court warns Ms. Akmal that should she fail to timely amend her
10 complaint in a manner that resolves the deficiencies described herein, the court will
11 dismiss her claims against Mr. Alston without prejudice. Ms. Akmal has already filed
12 two amended complaints (*see* Dkt.), and additional opportunities to amend will likely be
13 denied. The court notes also that the City currently has a motion to dismiss pending (*see*
14 Dkt. # 49). If Ms. Akmal wishes to amend her complaint in response to this pleading, the
15 City's motion will be tested against the new complaint. Accordingly, any new
16 allegations Ms. Akmal wishes to make against the City in response to the pending motion
17 must be included in the amended complaint. If Ms. Akmal amends her complaint, the
18 City is granted ten days in which to file supplemental briefing in response to the amended
19 complaint.

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1 Finally, the court also DENIES Ms. Akmal's request for an entry of default (*see* Resp. at
2 (Dkt. # 48)), because she has failed to comply with the applicable Rules.

3 Dated this 13th day of March, 2014.

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7 JAMES L. ROBART
8 United States District Judge
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